

Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson

In the Matter of Invitation Homes, Inc.

Matter Number 203170

September 24, 2024

Leasing or buying a home is one of the biggest decisions consumers make. As housing prices become increasingly unaffordable for working Americans since 2021, now more than ever the Commission should ensure fairness and honesty in the housing market. This obligation extends to advertised pricing and housing conditions, the return of security deposits, and eviction policies. The Commission, thanks in no small part to its diligent staff, fulfils its obligation today in an important settlement with one of the largest residential landlords in America. I join my fellow Commissioners in approving most of the complaint and stipulated order on which we vote today.

Invitation Homes, Inc. (“Invitation Homes”) is the nation’s largest single-family home landlord.¹ The Commission alleges that it misrepresented or failed to substantiate a number of material terms of its leasing agreements, including the monthly rental prices and mandatory fees, claims that each home passed a quality assurance inspection, that Invitation Homes provides “24/7 emergency maintenance,” and the circumstances under which it will withhold security deposits.² I concur in these charges (Counts I, II, III, IV, V, and VII) without reservation.

But the complaint goes too far and in Count VI purports to impose liability for failure to comply with the flagrantly unlawful Center for the Disease Control and Prevention (“CDC”) eviction moratorium.³ The Commission alleges that Invitation Homes violated Section 5 of the

programs or were subject to federally backed loans.⁶ The statutory moratorium prohibited landlords from filing any legal action to “recover possession” of their property “for nonpayment of rent or other fees or charges,” or charge any fees “related to such nonpayment of rent.”⁷ When the statutory moratorium expired in September 2020, Congress did not renew it. Instead, the CDC “decided to do what Congress had not”⁸ and issued an order halting evictions for *all* residential properties, not just evictions for property participating in federal assistance programs (“CDC Eviction Moratorium”).⁹ It invoked as authority for this extraordinary order Section 361(a) of the Public Health Service Act,¹⁰ a “decades-old statute that authorizes it to implement measures like fumigation and pest extermination.”¹¹ The CDC Eviction Moratorium purported to impose on violators criminal penalties of up to a \$500,000 fine and one year in jail.¹²

When the CDC Eviction Moratorium was set to expire in December 2020,¹³ Congress extended it for one month.¹⁴ When that extension expired, the CDC repeatedly extended it through July 2021.¹⁵ The U.S. District Court for the District of Columbia vacated the CDC Eviction Moratorium in its entirety as unlawful in May 2021.¹⁶ That vacatur order rendered the CDC Eviction Moratorium void nationwide from the moment it was adopted.¹⁷ The government immediately appealed,¹⁸ and moved the district court to stay its vacatur order pending the appeal.¹⁹ The district court granted the government’s motion,²⁰ and the D.C. Circuit declined to lift the stay.²¹ The challengers then moved the Supreme Court to lift the stay, but the Supreme Court

⁶ *Id.* § 4024, 134 Stat. at 492–494.

⁷ *Id.* § 4024(b)(1), (2), 134 Stat. at 493–94.

⁸ *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 760 (2021) (per curiam).

⁹ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sep. 2, 2020).

¹⁰ 42 U.S.C. § 264(a).

¹¹ *Ala. Ass’n of Realtors*, 594 U.S. at 760.

¹² See 85 Fed. Reg. at 55,296.

¹³ 85 Fed. Reg. at 55,297

¹⁴ See Consolidated Appropriations Act, 2021, Pub. L. 116–260, § 502, 134 Stat. 1182, 2078–2079.

¹⁵ *Ala. Ass’n of Realtors*, 594 U.S. at 760.

¹⁶ *Ala. Ass’n of Realtors v. HHS*, 539 F. Supp. 3d 29, 34 (D.D.C. 2021).

¹⁷ See, e.g., *Data Marketing Partnership, LP v. U.S. Dep’t of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) (Oldham, J.) (“Under prevailing precedent, § 706 ‘extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to “set aside”—*i.e.*, formally nullify and revoke—an unlawful agency action.’” (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 950 (2018))); *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021) (“Vacatur ... retroactively undoes or expunges a past state action. Vacatur is ‘[t]he act of annulling or setting aside.’ Unlike an injunction, which merely blocks enforcement, vacatur unwinds the challenged agency action.” (quoting Black’s Law Dictionary (11th ed. 2019))); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (“We have made clear that ‘[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.’” (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989))); *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 415 (D.D.C. 2020) (“The universal nature of vacatur means that after a court vacates an agency rule, the agency may not apply that rule to anyone in subsequent adjudicative decisions, even if those adjudications involve facts that predate the vacatur.” (emphasis in original)); *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 68 (D.D.C. 2019) (Jackson, J.) (discussing how a legal infirmity in a rule necessarily renders it void *ab initio*), *rev’d on other grounds sub nom., Make the Road N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

¹⁸ See Not. of Appeal, *Ala. Ass’n of Realtors v. HHS*, No. 1:20-cv-3377 (May 5, 2021) (ECF No. 55).

¹⁹ See Emergency Mot. to Stay, *Ala. Ass’n of Realtors v. HHS*, No. 1:20-cv-3377 (May 5, 2021) (ECF No. 57).

²⁰ *Ala. Ass’n of Realtors*, 539 F. Supp. 3d at 217–18.

²¹ *Ala. Ass’n of Realtors v. HHS*, No. 21-5093, 2021 WL 2221646 (June 2, 2021).

steered residents by urging them to sign its confusing “Hardship Affidavit” ostensibly to avoid eviction, but did not treat that affidavit as a substitute for the declaration required to trigger the protections of the CDC Eviction Moratorium.³⁵ The Commission claims that this conduct was an unfair act or practice in violation of Section 5.³⁶ I disagree.

The Commission’s claim compounds the CDC’s original affront to the rule of law. It resurrects the flagrantly unlaw

The Commission pleads that Invitation Homes's steering of its residents away from the protections of the CDC Eviction Moratorium was an unfair act or practice.⁴⁴ I do not understand why. An act or practice is unfair only if it "causes or is likely to cause substantial injury to consumers."⁴⁵ Denying a consumer a right or protection that he or she does not lawfully enjoy causes no injury at all, much less a substantial one. The CDC Eviction Moratorium and its extension were vacated in a final judgment and therefore legal nullities from the day they were adopted. They conferred no lawful rights or protections on anyone. Invitation Homes cannot have committed an unfair act or practice by steering residents away from invoking rights they did not lawfully enjoy.

The Commission's reading of Section 5 creates a dangerous incentive for regulators in other agencies. When an agency promulgates an aggressive regulation of questionable legality, it can enforce that regulation only up until a court vacates it. An agency considering such a regulation may conclude that the game is not worth the candle given how little enforcement work could be done before vacatur. But if the Commission can continue pursuing pre-vacatur violators indefinitely under Section 5, the promulgating agency may calculate differently. Regulated entities are far more likely to obey an unlawful regulation before vacatur if they know the Commission will pursue them indefinitely for pre-vacatur conduct. The Commission acting as an *ex post* force multiplier for other agencies' illegal regulations incents those agencies to promulgate more of them.

The Commission's inclusion of this theory in the complaint appears senseless at first glance. All the relief the Commission obtains in the settlement agreement it could obtain without pleading Count VI at all. And even if the Commission wanted to plead Count VI, the CDC Eviction Moratorium theory adds nothing. The other allegations of eviction-related conduct are sufficient to sustain the Commission's unfairness count.⁴⁶ Relying on the CDC Eviction Moratorium thus seems gratuitous.

The theory is not gratuitous, but it has nothing to do with Invitation Homes. I have explained elsewhere that the Commission's majority has taken a shine to ". 9w 2.38 0 Td(E)1 (vi)-29 ((e s)-3 (e
